

Claimant suffered accidental injury arising out of and in the course of her employment to her left shoulder on November 23, 2004. Claimant underwent surgery on the left shoulder with Vincent H. Key, M.D., on May 19, 2005. Claimant testified to developing problems with her right upper extremity, including the shoulder, beginning in April of 2005 due to the necessity of having to overuse her right shoulder due to her left shoulder and upper extremity being immobilized in a sling. Claimant testified to numbness in her right hand.

Claimant's history is significant in that she has had two prior shoulder surgeries on the right side. The first surgery was in February 1996 with Truett L. Swaim, M.D., resulting from a 1990 injury when claimant was a swimmer. The second surgery occurred in 2001 under the hand of Daniel M. Downs, M.D.

Respondent argues that claimant's right shoulder condition is not the result of any work performed by claimant for respondent, but rather is a natural consequence of the earlier injuries suffered by claimant. Claimant was referred to Dr. Key at the University of Kansas Medical Center, Department of Orthopedic Surgery, for an evaluation and recommendation regarding claimant's treatment and also for an opinion regarding the cause of claimant's ongoing problems. The Board notes that the medical record of Dr. Key attached to the preliminary hearing transcript contains only one exhibit, that being the July 15, 2005 recommendation for an MRI to the right shoulder. No other medical reports are attached to the preliminary hearing transcript.

However, contained in the Judge's file is respondent's letter to the ALJ of August 15, 2005, with the attached July 22, 2005 medical report of Dr. Key. Also attached to the August 15 letter are the August 12, 2005 return to modified duty slip and the August 12, 2005 referral for physical therapy, both from Dr. Key. Those identical reports are attached to claimant's letter of August 12, 2005, also directed to the ALJ. The Board accepts these letters, with the identical attached medical, as a stipulation on the part of the attorneys to include those reports in the record. It should be noted at the time of the preliminary hearing, the attorneys requested that the record remain open in anticipation of Dr. Key's reports. Unfortunately for all parties, the medical reports of Dr. Key contain no opinion regarding the cause of claimant's ongoing right shoulder problems. The only evidence in the record regarding the cause of claimant's right shoulder difficulties is the testimony of claimant. Claimant discusses the fact that she was required to overuse her right upper extremity due to the difficulties associated with her left shoulder injuries suffered while employed with respondent.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹

¹ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

The Board acknowledges that the only testimony supporting claimant's contentions of a work-related aggravation to her right upper extremity is claimant's testimony. The medical evidence in this record does not allude to or address that issue. However, a claimant's testimony alone is sufficient evidence of his or her own physical condition.²

Additionally, an accidental injury is compensable even when the accident serves only to aggravate a preexisting condition.³ Finally, where the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁴

The Board finds based upon claimant's testimony that she did suffer accidental injury arising out of and in the course of her employment to her right shoulder as a natural and probable consequence of the injury suffered to claimant's left shoulder and upper extremity from the November 23, 2004 accident.

Respondent further contends that the ALJ exceeded his authority in granting claimant the benefits from preliminary hearing. The only benefits awarded by the ALJ were temporary total disability compensation and ongoing medical care.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues, which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide both timely notice and timely written claim of accidental injury?
4. Is there any defense which goes to the compensability of the claim?⁵

Additionally, the Board may review those preliminary hearing orders where it is alleged the administrative law judge exceeded his or her jurisdiction or authority in granting

² *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

³ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁵ K.S.A. 44-534a.

or denying benefits.⁶ In this instance, K.S.A. 44-534a grants an administrative law judge the authority to award both temporary total disability compensation and ongoing medical care. The ALJ did not exceed his jurisdiction by determining claimant's entitlement to both temporary total disability compensation and medical care, whether that was a correct finding or not.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁷

The Board determines that claimant's entitlement to temporary total disability compensation and ongoing medical care are not issues which are appealable from a preliminary hearing order.

Finally, claimant argues in her brief that Docket Nos. 1,021,262 and 1,023,620 should be consolidated for the purposes of this determination. However, that issue was not presented to the ALJ and will not at this time be determined by the Appeals Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated August 16, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2005.

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁶ K.S.A. 2004 Supp. 44-551.

⁷ *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).